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In The SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.....

SECURITIES AND EXCHANGE COMMISSION,
Applicant-Respondent,

vs.

FIRST SECURITY BANK OF UTAH, N.A. and MURRAY STATE BANK,
Respondents.

CARL J. NEMELKA, COMMERCIAL PROPERTIES, INC., a corporation, and FRANCIS R. SALAZAR,
Intervenors-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Intervenors-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

A writ of certiorari is respectfully sought to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on August 30, 1971.

Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit has not been officially reported. The judgment and opinion of the Court of Appeals was made and entered on August 30, 1971, and a copy is appended to this petition (Appendix A).

The Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the District of Utah, Central Division, are appended to this petition (Appendix B).

Jurisdiction

Jurisdiction is invoked under 28 USC 1254 (1), which statutory provision is believed to confer on this Court jurisdiction to review the judgment below.

Questions Presented for Review

The District Court ordered enforcement of subpoenas duces tecum issued in a Securities and Exchange Commission investigation. Two of these subpoenas seek information relating to trust accounts maintained in certain banks by Nemelka and Salazar who are lawyers. The questions presented by this Petition are:

1. Do intervenors and in particular Nemelka and Salazar have enough of an interest or privilege to sustain intervention in the subpoena enforcement proceedings?

2. Are trust account records of a lawyer maintained for his clients protected by the attorney-client privilege?

3. Are the subpoenas invalid and unenforceable because they are beyond the scope of the Commission's investigation order?

Statutes Involved

The following statutory and regulatory provisions are involved in the within cause:

15 U.S.C.A. 77t (Sec. 20(a) '33 Act)

> (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may,

in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

15 U.S.C.A. 77s (Sec. 19(b) '33 Act)

(b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing. * * *

15 U.S.C.A. 78u (Sec. 21(a), (b) '34 Act)

(a) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this chapter or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its descretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this chapter, in the prescribing of rules and regulations thereunder, or in securing information to

serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(b) For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. * * *

Sec. 78-15-26 (5) U.C.A. 1953 provides:

> "It is the duty of an attorney and counsellor: (5) To maintain inviolate the confidences, and at every peril to himself to preserve the secrets, of his client;"

The Commission entered the following Order on August 19, 1970:

In the Matter of	ORDER DIRECTING PRIVATE INVESTIGATION AND DESIGNATING OFFICERS TO TAKE TESTIMONY
NEWPORT PHARMACEUTICALS INTERNATIONAL, INC.	
File No. D-1406	

I

The Commission's public official files disclose that no registration statement has been filed or is in effect with the Commission under the Securities Act of 1933 with respect to any securities of Newport Pharmaceuticals International, Inc.

II

Members of its staff have reported information to the Commission which tends to show that:

A. Newport Pharmaceuticals International, Inc. has been and is offering to sell, selling and delivering after sale to members of the public certain securities, namely, common stock of Newport Pharmaceuticals International, Inc.

B. While engaged in the offer and sale of such securities, such person made to purchasers and prospective purchasers untrue statements of material facts and omitted to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading concerning, among other things:

(1) the financial condition of the issuer;

(2) the assets held by the issuer;

(3) the business operations of the issuer;

(4) the value of certain licensing and marketing agreements relating to drugs; and

(5) the present and future market price of the issuer's stock.

C. While engaged in the offer, sale and delivery of such securities, such person, directly and indirectly, made use of the mails and means and instruments of transportation and communication in interstate commerce, and of the means and instrumentalities of interstate commerce.

III

The Commission, having considered the staff report and deeming such acts and practices, if true, to be in possible violation of Sections 5-(a), 5(c) and 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, finds it necessary and appropriate and hereby

ORDERS, pursuant to the provisions of Section 20(a) of the Securities Act of 1933 and Section 21(a) of the Securities Exchange Act of 1934, that a private investigation be made to determine whether the aforesaid person or any other persons have engaged or are about to engage in any of the reported acts or practices or in any acts or practices of similar purport or object; and

IT IS FURTHER ORDERED, pursuant to the provision of Section 19(b) of the Securities Act of 1933 and Section 21(b) of the Securities Exchange Act of 1934, that for the purpose of such investigation Donald J. Stocking, Joseph F. Krys, Ralph H. Erickson, John M. High, Frank A. Rome, G. Gail Weggeland and Byron A. Hollis, and each of them, is hereby designated an officer of this Commission and empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda or other records deemed relevant and material to the inquiry, and to perform all other duties in connection therewith as prescribed by law.

By the Commission.

/s/ Orval L. DuBois
Orval L. DuBois
Secretary

Statement of the Case

In August, 1970 the Securities and Exchange Commission issued the above order directing a private investigation be made to determine whether Newport Pharmaceutical International, Inc. was violating some of the registration and anti-fraud provisions of the Federal Securities laws.

Francis R. Salazar and Carl J. Nemelka, practicing attorneys, maintained their trust accounts, for the convenience of their clients, in Salt Lake City banks. In the fall of 1970 subpoenas were served requiring production of the bank records. State court orders restrained the banks from responding to the subpoenas. The Commission brought proceedings under 15 U.S.C. 77v(b), 78u(c) to enforce compliance. The District Court allowed intervention under Rule 24(b), Federal Rules of Civil Procedure. The District Court ordered enforcement of the subpoenas and granted a stay pending appeal. The Court of Appeals for the Tenth Circuit affirmed.

Reasons for Granting the Writ

This Court should review the decision below for the following reason:

1. The Court of Appeals for the Tenth Circuit has decided a Federal question in a way that is in conflict with applicable decisions of this Court.

POINT I.

THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Tenth Circuit misconstrued and misapplied this Court's holding in *Donaldson v. United States*, 400 U.S. 517, when it observed that the intervenors, and in particular Nemelka and Salazar, the attorneys, had no interest or privilege involved that would give them standing to question the scope of the Commission's order and when it also observed, "If the District Court had been able to foresee the Donaldson decision, it would probably have denied intervention." This statement of the Court of Appeals casts considerable doubt on the question of whether or not intervenors, and in particular Nemelka and Salazar, had standing to intervene and to question the validity of the enforcement proceedings.

Whether a lawyer has standing to question the scope of a Commission investigative order when his trust account records, kept for convenience of clients, are sought by Commission subpoena, is an important Federal question that should be clearly decided by this Court and should not be left in the doubtful posture that it is now in because of the Tenth Circuit's interpretation of this Court's holding in *Donaldson*.

To hold that the attorney-client privilege is inapplicable in a particular case is one thing. But to hold that a lawyer has no standing or has no protectable interest in his own trust accounts so as to enable intervention in a subpoena enforcement proceeding, is to seriously impair an attorney's duty to maintain the confidence of his client which in turn adversely affects the administration of justice.

The Court in *Donaldson* discussed this Court's de-

cisions in *Reisman v. Caplin*, 375 U.S. 440, 11 L.Ed. 2d 459, 84 S. Ct. 508; *United States v. Powell*, 379 U.S. 48, and *Ryan v. United States*, 379 U.S. 61.. This Court in each of those decisions clearly indicated that intervention is appropriate where "the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution," or where "*it is protected by the attorney-client privilege.*" The Tenth Circuit in the instant case indicates the trial court should not permit intervention of a lawyer who seeks to prevent the government from obtaining material that may be protected by the attorney-client privilege. *Reisman, Donaldson, Powell* and *Ryan* all clearly indicate that the rule is to the contrary. Whether in a particular case the attorney-client privilege will be found to exist, is not the question. The question is when the attorney-client privilege is asserted as a basis for preventing the government from obtaining material claimed to be protected by that privilege, the attorney should be permitted to intervene, if not as a matter of right, certainly on a permissive basis.

This Court in *Powell* and *Ryan* was primarily concerned with the standards the Internal Revenue Service must meet in order to obtain judicial enforcement of its order. In those cases the Court spelled out certain guidelines as to the standards the Commissioner had to meet in order to obtain judicial enforcement. The same problem exists in this case with respect to the Securities and Exchange Commission. This Court should determine the standards the Securities and Exchange Commission must meet in order to obtain judicial enforcement of its orders. The showing made by the Commission in the

trial court clearly indicated the subpoenas in question were far beyond the scope of the Commission's order. The Circuit Court, without discussion and without spelling out guidelines or a standard to be met, simply affirmed the trial court. It is important to the bench and bar that this Court interpret the applicable Federal statutes and determine the standards the Securities and Exchange Commission must meet in order to obtain judicial enforcement of its orders. In addition, it is important that guidelines be set to determine whether the agents issuing the subpoenas have gone outside the scope of the Commission's order and are, therefore, acting completely without authority.

In this connection, it should be kept in mind that it is the "*Commission*" that is empowered under these statutes to make such investigations as it deems necessary to determine whether any person has violated or is about to violate any of the Securities laws. It is the Commission that determines the subject matter of the investigation and the scope of it, not the officer named to do the investigating. Under Section 78u(b) an officer designated by the Commission can administer oaths, subpoena witnesses and require production of books, papers or other records which the "*Commission*" deems relevant or material to the inquiry.

It should be noted that the Commission in its Order recited that members of its staff had reported certain information that tended to show:

> (a) *That Newport Pharmaceuticals International, Inc.* had been offering to sell, selling and delivering to members of the public its common stock. The staff also reported to the Commission

> that *Newport* while engaged in the offer and sale of the securities made certain untrue statements or omitted to state certain material facts about *Newport* itself and its stock and that *Newport* itself used instruments of transportation and communication in interstate commerce while engaged in the offer, sale and delivery of its own stock.

There is no reference in the Order to the Commission's staff having reported to it as a basis for the Order that anyone else was violating the Securities laws or was dealing in the common stock of Newport. The only information reported to the Commission as a basis for the Order was that Newport itself was engaged in dealing with its own common stock in a manner violative of applicable Securities laws.

The Commission recites that after having considered the staff report pertaining to violations or possible violations by Newport itself in dealing with its own common stock warranted an investigation of this activity. The staff report and all of the recitals in paragraph II A, B, and C of the Commission's Order refers to the staff report as the predicate for its Order of Investigation contained in paragraph III. In paragraph III it is recited that the Commission "*having considered the staff report and deeming such acts and practices, if true, to be in possible violation of*" certain sections of the Securities Act and of the Securities Exchange Act and it then orders that a private investigation be made to determine whether Newport or any other persons have engaged or are about to engage in any violative acts or practices. It is only in the second paragraph of paragraph III of the Order that the words, "or any oth-

er persons" appear. All of the rest of the Order, the predicate for which is contained in paragraph II, the staff report on which the Order was based, refers solely to possible violations by Newport itself in the sale of its own common stock. No place in the staff report or in what information was delivered to the Commission on which it based its Order was anything at all said directly or indirectly about anyone being in violation or engaging in practices that were in violation of the Securities laws other than Newport itself in dealing with its own common stock. No suggestion is made that other persons were involved.

It is crystal clear from a reading of the Commission's Order that it intended an investigation into the acts and practices of Newport only in connection with its own common stock. It is clear the Commission determined that the activities of Newport were to be the subject of the "private investigation." There was nothing in the staff report to indicate that other persons than Newport were to be investigated concerning their acts or practices with reference to the common stock of Newport.

The subpoenas in question seek to obtain the trust account records of the two lawyers, Salazar and Nemelka, and the business account of Commercial Properties, Inc. Nowhere in the record is it claimed that these documents are calculated to reflect transactions by Newport itself with its own common stock. The officers issuing the subpoenas are simply on a fishing expedition, attempting to examine the record of individuals relating to transactions these individuals may have had in the common stock of Newport.

The balancing of opposing equities is essential — the interest of the public in permitting governmental agencies to expeditiously carry on investigations, on the one hand, and the interest of the private individual not to have his rights arbitrarily infringed by an investigating agent, on the other.

As stated above, it is important that this Court spell out the standards that the Commission itself must meet and that this Court spell out certain guidelines for determining whether the agents issuing subpoenas are outside the scope of the Commission's order and therefore acting unlawfully.

Conclusion

Petitioners respectfully urge this Court to grant certiorari for the reasons stated above.

Respectfully submitted,

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Appendix A

Circuit Court of Appeals Judgment and Opinion

JULY TERM — AUGUST 30, 1971

Before Honorable Jean S. Breitenstein, and Honorable Robert H. McWilliams, Circuit Judges; and Honorable Ewing T. Kerr, District Judge.

SECURITIES AND EXCHANGE COMMISSION,
Applicant-Appellee,

v.

FIRST SECURITY BANK OF UTAH, N.A. and MURRAY STATE BANK,
Respondents,

CARL J. NEMELKA, COMMERCIAL PROPERTIES, INC., a corporation, JERRY E. ROMNEY d/b/a ROMNEY ENTERPRISES, and JERRY E. ROMNEY an individual and FRANCIS R. SALAZAR,
Intervenors-Appellants.

FILED
United States Court of Appeals
Tenth Circuit
Sept. 20, 1971
Clerk
No. 71-1135

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah, Central Division, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is affirmed.

HOWARD K. PHILLIPS, Clerk

By Helen R. Bartha
Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

July Term, 1971

SECURITIES AND EXCHANGE COMMISSION,
Applicant-Appellee,

v.

FIRST SECURITY BANK OF UTAH, N.A. and MURRAY STATE BANK,
Respondents,

CARL J. NEMELKA, COMMERCIAL PROPERTIES, INC., a corporation, JERRY E. ROMNEY d/b/a ROMNEY ENTERPRISES, and JERRY E. ROMNEY an individual and FRANCIS R. SALAZAR,
Intervenors-Appellants.

FILED
United States Court of Appeals
Tenth Circuit
Aug. 30, 1971
Howard K. Phillips
Clerk
No. 71-1135

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION
(D.C. No. C 266-70)

Jacob H. Stillman, Assistant General Counsel (Philip A. Loomis, Jr., General Counsel, Walter P. North Associate General Counsel, and Frederick L. White, Attorney, Securities and Exchange Commission, with him on the brief), for Applicant-Appellee.

Glenn C. Hanni (David K. Winder, Strong & Hanni, Shirley P. Jones, Jr., and Nick J. Colessides with him on the brief) for Intervenors-Appellants.

Before BREITENSTEIN and McWILLIAMS, Circuit Judges, and KERR, District Judge.

BREITENSTEIN, Circuit Judge.

On the application of the Securities and Exchange Commission the district court directed enforcement of four subpoenas duces tecum issued in a Commission investigation of possible violations of the federal securities laws. The subpoenas seek production of certain records of the First Security Bank of Utah, N.A., and of the Murray State Bank. The banks do not oppose the Commission's application for subpoena enforcement. Certain depositors who maintain accounts in the banks sought to prevent compliance by the banks and were permitted to intervene. The appeal is by the intervenors.

A Commission order directed that a private investigation be made to determine if the registration and anti-fraud provisions of the federal securities laws had been violated in the offer and sale of common stock of Newport Pharmaceutical International, Inc. Between September 29 and October 8, 1970, four subpoenas were served requiring production of bank records relating to the account statements, deposit slips, items deposited, and checks drawn on the accounts of the intervenors. State court orders restrained the banks from responding to the subpoenas.

The Commission brought proceedings under the Securities Act of 1933, 15 U.S.C. § 77v(b), and the Securities Exchange Act of 1934, 15 U.S.C. § 78u(c),

against the banks to enforce compliance with the subpoenas. The interventions were allowed under the permissive provisions of Rule 24(b), F.R. Civ. P. The district court ordered enforcement and granted a stay pending appeal.

Two of the subpoenas seek information relating to trust accounts maintained by the intervenors Nemelka and Salazar who are lawyers. They say that the subpoenaing of records pertaining to such accounts violates the attorney-client privilege which they and their clients will not waive. In essence their claim is that bank records of receipts and disbursements in their trust accounts are privileged communications. Comparable claims have been rejected in O'Donnell v. Sullivan, 1 Cir., 364 F.2d 43, 44, cert. denied 385 U.S. 969, and Harris v. United States, 9 Cir., 413 F.2d 316, 319-320. We agree with those decisions.

The privilege extends "to the substance of matters communicated to an attorney in professional confidence." Colton v. United States, 2 Cir., 306 F.2d 633, 637, cert. denied 371 U.S., 951. The deposit and disbursement of money in a commercial checking account are not confidential communications. The records are the property of the bank and are made by it for its business purposes. The functions and responsibilities of bank employees are not analogous to those of an attorney's secretaries and clerks. The relationship between each bank and the intervening depositor is that of a debtor-creditor.

United States v. Kovel, 2 Cir., 296 F.2d 918, is not contrary to our conclusions. That case concerned a communication made to an accountant, the employee of a

lawyer, for the purpose of obtaining legal advice from the lawyer. The maintenance of checking accounts is not shown to have any relevance to any communications made in confidence between a lawyer and client for the purpose of obtaining legal advice. A client may not immunize his business transactions from discovery by the device of a lawyer's commercial checking account. Cf. Pollock v. United States, 5 Cir., 202 F.2d 281, 286, cert. denied 345 U.S. 993.

The intervenors contend that the subpoenas were invalid and unenforceable because they were beyond the scope of the Commission's order. The authority of the Commission to make investigations of possible violations is found in 15 U.S.C. §§ 77t(a) and 78u(a). Section 77s (b) provides that in connection with such investigations

> "any member of the Commission or any officer or officers designated by it are empowered to * * * require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry."

A similar provision is found in § 78u(b).

The Commission order states that no registration statement has been filed with respect to Newport securities; that Newport has been offering its common stock for sale to the public; that while so engaged Newport has made certain untrue statements and has omitted to state material facts; and that in such activities Newport has used the mails and the instrumentalities of interstate commerce.

The Commission ordered that:

> "a private investigation be made to determine whether the aforesaid person [Newport] or any other persons have engaged or are about to engage in any of the reported acts or practices * * * ."

The Commission also ordered that certain named individuals and each of them

> "is hereby designated an officer of this Commission and empowered to * * * require the production of any books, papers, correspondence, memoranda or other records deemed relevant and material to the inquiry * * * ."

The subpoenas were issued by one of the officers so designated.

Investigative powers given by statute to an administrative agency are not derived from the judicial function and are "more analogous to the Grand Jury." United States v. Morton Salt Co., 338 U.S. 632, 642-643. Questions concerning agency subpoenas should be promptly determined so that the subpoenas, if valid, may be speedily enforced. See United States v. Davey, 2 Cir., 426 F.2d 842, 845.

The Commission points out that the scope of the Commission order was not questioned by the banks but by the intervenors and was untimely because some two and a half months had elapsed after the enforcement application before the question was raised. This delay is unjustifiable but the district court did not reject the issue because of untimeliness and we must consider it on its merits.

The Commission urges that the intervenors have

no standing to question the scope of the order and points out that the banks are not raising the issue. After the district court permitted the interventions and granted enforcement of the subpoenas, the Supreme Court decided Donaldson v. United States, 400 U.S. 517. That case concerned the enforcement of a summons under the Internal Revenue Code to give testimony and produce records. The Court noted that the intervening taxpayer had no proprietary interest in the records and no privilege was involved. In the present case the intervenors have no such interest or privilege. After commenting that the taxpayer to the extent that he has a protectable interest "may always assert that interest in its proper place in any subsequent trial," the Court said that the interest was not enough to sustain intervention in the proceedings to enforce the summons and that a contrary holding "would unwarrantedly cast doubt upon and stultify the Service's every investigatory move." Ibid. at 531.

If the district court had been able to foresee the Donaldson decision, it would probably have denied intervention. However, intervention was granted and in the circumstances presented we have considered the order and the cases cited by the intervenors. Jones v. Securities and Exchange Commission, 298 U.S. 1, was concerned with the withdrawal of a registration statement. In Penfield v. Securities and Exchange Commission, 9 Cir., 143 F.2d 746, there was an amended order to bring in transactions in a security different from that included in the first order. Shotkin v. Nelson, 10 Cir., 146 F.2d 402, considered objections by the person ordered to comply with the subpoena and said that a

subpoena must be within the scope of the authority granted. If in the situation presented we must consider the scope of the order, we are convinced that the subpoenas were within that scope. The Commission authorized an investigation to determine whether Newport "or any other persons" were engaged in forbidden activities. This is enough to authorize subpoenas for the production of records which might reveal the existence and extent of intervenors' transactions in Newport stock.

Affirmed.

Appendix B

(Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the District of Utah, Central Division)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

CIVIL ACTION File No. C 266-70

SECURITIES AND EXCHANGE COMMISSION,
Applicant,

v.

FIRST SECURITY BANK OF UTAH, N.A., and MURRAY STATE BANK,
Respondents.

CARL J. NEMELKA, COMMERCIAL PROPERTIES, INC., a corporation, JERRY E. ROMNEY d/b/a ROMNEY ENTERPRISES, and JERRY E. ROMNEY, an individual, and FRANCIS R. SALAZAR,
Plaintiffs in Intervention,

v.

SECURITIES AND EXCHANGE COMMISSION,
Defendant in Intervention.

FINDINGS OF FACT and CONCLUSIONS OF LAW

This matter came before the Court for trial on the merits on December 14, 1970, but was continued from that date to December 18, 1970, and thereafter to December 30, 1970, pursuant to stipulation of counsel. At

the hearing held on December 18, 1970, the following counsel were present: David K. Winder, representing intervenor Francis R. Salazar; Nick J. Colessides, representing intervenor Carl J. Nemelka; Thomas R. Blonquist, representing intervenors Commercial Properties, Inc. Jerry E. Romney dba Romney Enterprises, and Jerry E. Romney; and G. Gail Weggeland and Delano S. Findlay, representing the applicant, Securities and Exchange Commission. No appearance was made for either the First Security Bank of Utah, N.A., or for Murray State Bank. The continued hearing on December 30, 1970, involved the foregoing appearances, counsel for First Security Bank also appearing. Counsel for Murray State Bank was excused by the Court at his request. Glenn C. Hanni, Esq., appeared for Mr. Salazar in lieu of David K. Winder, Esq. The matter having been submitted on the merits and the Court having considered the evidence and the arguments of counsel and being fully advised in the matter, makes the following Findings of Fact and Law:

FINDINGS OF FACT AND LAW

1. This matter is properly before the Court on application of the Securities and Exchange Commission for orders requiring the First Security Bank of Utah, N.A., and the Murray State Bank to respond to and produce documents pursuant to four different subpoenas duces tecum.

2. A subpoena duces tecum calling for the production of bank accounts and records was duly served upon the First Security Bank of Utah, N.A., on September 29, 1970. The subpoena duces tecum was signed by G. Gail Weggeland, an officer of the Securities and Ex-

change Commission acting pursuant to an Order of Investigation entered by the Securities and Exchange Commission on August 19, 1970, pursuant to Section 20(a) of the Securities Act of 1933, as amended, 15 U.S.C. 77t(a), and Section 21(a) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78u(a).

3. On October 2, 1970 and October 8, 1970, subpoenas duces tecum were issued by Byron A. Hollis, an officer of the Securities and Exchange Commission, designated in the Order of Investigation, calling for the production by the Murray State Bank of certain accounts and bank records of Jerry Romney dba Romney Enterprises, Jerry Romney, individually, Commercial Properties, Inc., and Carl J. Nemelka. These subpoenas duces tecum were duly served upon either officers of the bank or, pursuant to instructions issued by a bank officer, upon the attorney for the bank.

4. The Order of Investigation under which the subpoenas duces tecum were issued designates that a private investigation be conducted in the matter of Newport Pharmaceuticals International, Inc. ("Newport"). This Order directed investigation to determine, among other things, whether in the offer and sale of Newport common stock any persons have violated or are about to violate Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, or Rule 10b-5 thereunder. The Court finds that the Order of Investigation directs investigation of matters that are within the scope of the investigatory powers of the Commission.

5. The respondents, First Security Bank of Utah, N.A., and Murray State Bank, and the plaintiffs in in-

tervention, Carl J. Nemelka, Commercial Properties, Inc., Jerry E. Romney dba Romney Enterprises, Jerry E. Romney, and Francis R. Salazar, have not raised as an issue the adequacy of the service of the subpoenas duces tecum or the authority of the investigating officer to act pursuant to the Order of Investigation. The Court finds that the subpoenas duces tecum were duly served upon the respondent banks and issued pursuant to proper authority and called for documents and records within the investigative scope of the Commission.

6. The subpoenas duces tecum called for the production of certain bank records which, it appears to the Court, are relevant and material to an inquiry and investigation into stock sales of Newport. The relevancy was established by testimony of Byron A. Hollis that proceeds of sales of Newport stock were processed in securities brokers' checks into deposits traced into the bank accounts which were subpoenaed.

7. Pursuant to stipulation and by order of the Court, the records called for in a subpoena duces tecum served upon the First Security Bank of Utah, N.A., on October 7, 1970, have been deposited with the Clerk of the Court in a sealed envelope and are held by the Clerk pending further order of the Court. This order was entered on the 26th day of October, 1970.

8. The Murray State Bank has not, for the most part, produced the records or documents called for in the subpoena duces tecum served upon the bank.

9. The applicant, Securities and Exchange Commission, has not already obtained the information or documents sought by the subpoenas duces tecum.

10. Compliance with the subpoenas duces tecum is not unreasonable or unduly burdensome, and the Court has determined and hereby finds that there is no feasible or reasonable means to limit or restrict access on subpoena to said bank records consistent with the power and right of plaintiff to make inquiry and investigation into stock sales by Newport through said subpeonas and concerning related matters as specified in the Order of investigation issued by the plaintiff commission and received in evidence as plaintiff's Exhibit 1.

11. The applicant, Securities and Exchange Commission, has not sought to harass, embarass, or annoy the plaintiffs in intervention by issuing the subpoenas duces tecum in question herein.

12. The Court has heard evidence and argument relating to defenses and claims in opposition to the enforcement of the subpoenas duces tecum made by the plaintiffs in intervention. The Court finds with respect thereto:

(a) That plaintiffs in intervention do not have a property right or interest in any of the bank records called for by the subpoenas duces tecum.

(b) That Francis R. Salazar and Carl J. Nemelka, plaintiffs in intervention, are attorneys engaged in the practice of law; however, they may not assert in this instance an attorney-client privilege in behalf of their clients to the bank records called for in the subpoenas duces tecum.

(c) That Commercial Properties, Inc., Jerry E. Romney dba Romney Enterprises, and Jerry E. Romney, individually, plaintiffs in

intervention, have not established that they have existing constitutional rights and privileges which would be impaired or diminished by this Court if it ordered compliance with the subpoenas duces tecum.

(d) That enforcement of the subpoenas duces tecum cannot in any way burden the plaintiffs in intervention or require any action or preparation detrimental to them.

(e) That the documents called for are not subject to privilege or otherwise exempt from disclosure by the respondents, First Security Bank of Utah, N.A., and Murray State Bank, to the Securities and Exchange Commission.

(f) Neither Carl J. Nemelka nor Francis R. Salazar, plaintiffs in intervention, is an attorney for the respondent banks, First Security Bank of Utah, N.A., or Murray State Bank.

CONCLUSIONS OF LAW

From the foregoing findings of fact and law, the Court makes the following findings of law:

1. This Court has jurisdiction over the parties to and the subject matter of this proceeding (15 U.S.C. 77v(b), 15 U.S.C. 78u(c)) and venue is properly laid in the Central Division of this District.

2. The applicant, Securities and Exchange Commission, is authorized pursuant to Section 20(a) of the Securities Act of 1933, as amended, 15 U.S.C. 77t(a) and Section 21(a) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78u(a) to issue an order directing a private investigation in order to investigate possible violations of Sections 5-

(a), 5(c) and 17(a) of the Securities Act of 1933, as amended, and Section 10(b) of the Securities Exchange Act of 1934, as amended, and Rule 10b-5 thereunder.

3. Applicant, Securities and Exchange Commission, is authorized pursuant to Section 19(b) of the Securities Act of 1933, as amended, 15 U.S.C. 77s(b) and Section 21(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78u(b) to designate officers of the applicant to investigate possible violations as enumerated above, and empower them to administer oaths, affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda or other records deemed relevant or material to the investigation.

4. The applicant's order directing the investigation in the matter of Newport Pharmaceuticals International, Inc. ("Newport"), was issued pursuant to a lawful purpose and was within the Commission's power, and is sufficient to authorize the issuance of the subpoenas duces tecum thereunder.

5. The documents sought in the applicant's subpoenas duces tecum are deemed relevant to the Commission's investigation.

6. The terms of the subpoenas duces tecum and the production of the documents sought therein are reasonable and not unnecessarily burdensome to the respondent banks, or to the intervenors.

7. The plaintiffs in intervention, Carl J.

Nemelka, Commercial Properties, Inc., Jerry E. Romney dba Romney Enterprises, Jerry E. Romney, individually, and Francis R. Salazar, have not established any privilege, including the attorney-client p r i v i l e g e, that would be grounds or basis for the Court to refuse to issue an order to require compliance with the subpoenas duces tecum in question.

8. The applicant, Securities and Exchange Commission, is entitled to the relief prayed for.

9. An appropriate order enforcing the subpoenas duces tecum should be entered.

10. In order to sustain the validity of the order, any of the foregoing Findings of Fact and Law may, if appropriate, be deemed Findings and Conclusions of Law, and vice versa.

IT IS HEREBY ORDERED that the foregoing findings of fact and law and findings of law be, and hereby are, adopted by the Court.

Dated this 7th day of January, 1971.

/s/ A. Sherman Christensen
United States District
Court Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION,
Applicant,

vs.

FIRST SECURITY BANK OF UTAH, N.A., and MURRAY STATE BANK,
Respondents.

CARL J. NEMELKA, COMMERCIAL PROPERTIES, INC., a corporation, JERRY E. ROMNEY dba ROMNEY ENTERPRISES, and JERRY E. ROMNEY, an individual, and FRANCIS R. SALAZAR,
Plaintiffs in Intervention,

vs.

SECURITIES AND EXCHANGE COMMISSION,
Defendant in Intervention.

Filed in United States District Court District of Utah
Jan. 6, 1971
No. C 266-70

ORDER REQUIRING OBEDIENCE TO SUBPOENAS DUCES TECUM

The above-entitled matter having come on for hearing on applicant's motion for an order to require obedience to subpoenas duces tecum on December 18, 1970, and the Court having considered the contentions and claims of the applicant, Securities and Exchange Commission, and also those of the plaintiffs in intervention, Commercial Properties, Inc., Jerry E. Romney

dba Romney Enterprises, and Jerry E. Romney, individually, Carl J. Nemelka, and Francis R. Salazar, and having heard and considered the response and position of the respondent banks, First Security Bank of Utah, N.A., and Murray State Bank; and having considered the evidence and argument of counsel and the law applicable thereto, and the Court having this date made, entered and filed herein its Findings of Fact and Conclusions of Law; and in accordance with such Findings of Fact and Conclusions of Law, it is hereby.

ORDERED, ADJUDGED and DECREED that:

1. The Clerk of the Court is hereby directed to surrender to the applicant, Securities and Exchange Commission on January 25, 1971, or at such later time, if any, as plaintiff may direct, the sealed envelope which is in the custody and care of the Clerk of the Court, having been deposited by the First Security Bank of Utah, N.A., pursuant to the order of this Court and which purportedly contain the documents called for in a subpoena duces tecum issued by an officer of the Securities and Exchange Commission pursuant to an Order of Investigation and duly served upon the First Security Bank of Utah, N.A., on September 29, 1970.

2. In the event that the documents called for in the subpoena duces tecum are not all contained in said envelope or are not in recognizable and useful form and appearance, then the applicant, Securities and Exchange Commission, may by motion and notice seek a further order of the Court against the First Security Bank of Utah, N.A., to require compliance with the administrative subpoena.

3. An officer of the Murray State Bank appear in person before Byron A. Hollis, an officer of the Securities and Exchange Commission, at Room 6004, Federal Building, 125 South State Street, Salt Lake City, Utah, on the 25th day of January, 1971, or at such later time, if any, as plaintiff may direct, and identify and produce the following documents and records:

(a) "Copies of ALL checking and account statements, deposit slips, items deposited, and checks drawn on the accounts of Jerry Romney or Romney Enterprises, for the period January 1, 1970, to date."

(b) "Copies of all checking and account statements, deposit slips, items deposited, and checks drawn on accounts of Carl J. Nemelka or Carl J. Nemelka Trust Account for the period January 1, 1970, to date."

(c) "Copies of all checking and account statements, deposit slips, items deposited, and checks drawn on accounts of Commercial Properties, Inc., for the period January 1, 1970, to date."

Jurisdiction of this matter is retained for the purpose of giving full effect to this order, and for the purpose of making such other orders and decrees, or taking such other action as may become necessary or appropriate to carry out and enforce the purpose of this order.

Dated this 7th day of January, 1971.

A. Sherman Christensen
United States District
Judge

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-574

CARL J. NEMELKA, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

The Securities and Exchange Commission served subpoenas duces tecum upon the First Security Bank of Utah, N.A. and the Murray State Bank requiring production of the banks' records of checking accounts maintained by petitioners (R. 16-26).[1] Two of the three petitioners—Nemelka and Salazar—are lawyers who maintain their accounts as trust accounts

[1] "R." refers to Volume II of the record on appeal in the court of appeals.

for their clients (R. 162). The subpoenas were issued pursuant to an order by the Commission (Pet. 4-6) directing an investigation into possible federal securities laws violations in the offer and sale of the unregistered common stock of Newport Pharmaceuticals International, Inc. ("Newport"). This investigation had disclosed that proceeds from the sale of the stock had been deposited in petitioners' accounts (R. 12-14, 17-18).

After petitioners obtained state court orders restraining the banks from complying with the subpoenas, the Commission instituted a proceeding against the banks in the United States District Court for the District of Utah seeking enforcement of the subpoenas (R. 1-4, 10, 21-33). That court (R. 119) permitted petitioners to intervene in the subpoena enforcement proceeding (Fed. R.C.P. Rule 24(b)). The district court, after a hearing, rejected petitioners' objections to the subpoenas (R. 159-165) and enforced them (R-165). On petitioners' appeal, the Court of Appeals for the Tenth Circuit affirmed. The banks upon which the subpoenas were served have not opposed the Commission's application for enforcement.[2]

1. Petitioners contend that the court of appeals "misconstrued and misapplied" *Donaldson* v. *United States*, 400 U. S. 517, so as to "cast * * * considerable doubt on the question of whether or not intervenors * * * had standing to intervene and to

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[2] The district court stayed its enforcement order pending appeal and, subsequent to the decision of the court of appeals, continued the stay pending disposition of the present petition for certiorari.

question the validity of the enforcement proceedings" (Pet. 8).[a] However, petitioners were permitted to intervene and received decisions—albeit adverse—on the merits of their claims from both the district court and the court of appeals.

In the court of appeals petitioners raised two arguments: (1) that the banks' records of the accounts maintained by the lawyer petitioners were privileged communications and (2) that the subpoenas were beyond the scope of the Commission's order of investigation. The court of appeals rejected the privilege claim, finding that the records were the property of the banks, not of petitioners, and reflected no communications made in confidence for the purpose of obtaining legal advice (Pet. 17-18). In its discussion of the second objection, respecting the scope of the Commission's order, the court of appeals, citing *Donaldson*, indicated that since petitioners had neither a property interest in, nor any privilege with respect to, these account records, petitioners probably lacked standing to intervene to object to the scope of the subpoenas (Pet. 19-20).

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[a] Although the two lawyer-petitioners pose also under "Questions Presented for Review" (Pet. 2) the issue whether the attorney-client privilege applies to bank records of a trust account maintained by a lawyer for his clients, the petition does not discuss this issue, and accordingly neither does this Memorandum. As the court of appeals in this case observed in holding the privilege inapplicable to these records, the Courts of Appeals for both the First and the Ninth Circuits have rejected claims of attorney-client privilege in similar situations. *O'Donnell* v. *Sullivan*, 364 F. 2d 43, 44 (C.A. 1), *certiorari denied*, 385 U.S. 969; *Harris* v. *United States*, 413 F. 2d 316, 319-320 (C.A. 9).

The court pointed out, however, that since the district court had not rejected petitioners' objection to the scope of the subpoenas on the ground of standing (*Donaldson* had been decided after the district court's ruling), it likewise would examine this objection on its merits (Pet. 19, 20-21). The court of appeals did not suggest that *Donaldson* would deny petitioners standing to raise the claim that the records were protected by the attorney-client privilege.[4]

2. Petitioners' contention on the merits is that the subpoenas exceeded the scope of the order of investigation because the subpoenas sought information about transactions effected by *petitioners*, whereas the order, in referring to information reported to the Commission by its staff, did not mention transactions by persons other than Newport itself. The order, however, expressly directed an investigation to determine whether Newport "or any other persons" have engaged in illegal transactions (Pet. 6).

Petitioners appear to argue that since the staff report referred to in the order did not mention pos-

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[4] We believe the court of appeals was correct in its view of the impact of *Donaldson* on petitioners' standing to intervene on the basis of a claim that the subpoenas exceeded the scope of the Commission's order. Subpoena enforcement proceedings are summary in nature, *Donaldson* v. *United States*, *supra*, 400 U.S. at 528-530, and require expeditious action, *United States* v. *Davey*, 426 F. 2d 842, 845 (C.A. 2). To permit someone, by way of intervention in such a proceeding, to object to enforcement of a subpoena issued to another person and calling for documents as to which the objector has neither a privilege nor a proprietary interest would, as this Court stated in *Donaldson*, "unwarrantedly cast doubt upon and stultify the * * * [agency's] every investigatory move." 400 U.S. at 531.

sible violations by persons other than Newport, the order could not encompass an investigation of persons other than Newport. This view is contrary to this Court's repeated holdings that administrative agencies need not make a showing of probable cause for believing that a violation has occurred, or establish any other similar basis, to obtain enforcement of their subpoenas.[5] An agency "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not" (*United States* v. *Morton Salt Co.*, 338 U. S. 632, 643). Furthermore, even if the mention of the staff report did somehow operate to limit the investigation to an inquiry into the lawfulness of Newport's own transactions, it does not follow that information concerning transactions by other persons would be irrelevant to such an inquiry. It is often necessary, in order to determine whether a particular person's transactions were unlawful, to obtain information about transactions by other persons.[6]

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[5] *United States* v. *Powell*, 379 U.S. 48, 57; *United States* v. *Morton Salt Co.*, 338 U.S. 632; *Oklahoma Press Corp.* v. *Walling*, 327 U.S. 186; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507-510. See also *Woolley* v. *Securities and Exchange Commission*, 97 F. 2d 258 (C.A. 9), certiorari denied, 305 U.S. 614; *Consolidated Mines* v. *Securities and Exchange Commission*, 97 F. 2d 704 (C.A. 9).

[6] For example, the determination whether a corporation has violated the registration provisions of the Securities Act in issuing securities may turn on whether persons purchasing the securities from the corporation have engaged in transactions involving resales to the public, thus making inapplicable the exemption from registration for non-public offerings. See Section 4(2) of the Securities Act of 1933, 15 U.S.C. 77d(2).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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General Counsel,

WALTER P. NORTH,
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NOVEMBER 1971.

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